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FEDERAL ELECTION COMMISSION

2017 FEB 14 PM 12: 46

FEDERAL ELECTION COMMISSION
FIRST GENERAL COUNSEL'S REPORT

MUR: 7099
DATE COMPLAINT FILED: 7/6/2016
DATES OF NOTIFICATION: 7/12/2016
DATE OF LAST RESPONSE: 9/2/2016
DATE ACTIVATED: 11/17/2016

EXPIRATION OF SOL: 07/20/2020 –
12/17/2020
ELECTION CYCLE: 2016

COMPLAINANTS:

Campaign Legal Center, by J. Gerald Herbert
Democracy 21, by Fred Wertheimer
Paul S. Ryan

RESPONDENTS:

Suffolk Construction Company, Inc.
Priorities USA Action and Greg Speed in his
official capacity as treasurer

**RELEVANT STATUTE
AND REGULATIONS:**

52 U.S.C. § 30119
11 C.F.R. § 103.3
11 C.F.R. § 115.1
11 C.F.R. § 115.2

INTERNAL REPORTS CHECKED:

Disclosure Reports

FEDERAL AGENCIES CHECKED:

None

I. INTRODUCTION

The Complaint alleges that Suffolk Construction Company, Inc. ("Suffolk"), a federal government contractor, made two \$100,000 contributions to Priorities USA Action (the "Committee"), an independent-expenditure-only political committee, in violation of the Federal Election Campaign Act of 1971, as amended (the "Act").¹ The Complaint further alleges that the

¹ Compl. at 1, 4. (July 6, 2016).

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1 Committee may have knowingly solicited the federal contractor contributions in violation of the
2 Act, and may have failed to timely refund the contributions.²

3 The available record indicates that Suffolk was a federal contractor at the time of its
4 contributions to the Committee. Accordingly, we recommend that the Commission find reason
5 to believe that Suffolk violated the Act. We further recommend that the Commission take no
6 action at this time as to the Committee. Finally, we recommend that the Commission authorize
7 pre-probable cause conciliation with Suffolk.

8 II. FACTS

9 Suffolk is a Massachusetts corporation involved in various construction projects. While
10 Suffolk maintains that it primarily served as a general contractor and construction manager for
11 privately funded projects, it acknowledges that a "small fraction" of its work over the past five
12 years included federal contracts.³ Suffolk contributed \$100,000 to the Committee on July 20,
13 2015, and another \$100,000 to the Committee on December 17, 2015.⁴ The Committee
14 disclosed receipt of these contributions on its 2015 Year-End Report.⁵

15 The Complaint notes that on April 7, 2016, the Center for Public Integrity reported that
16 the Committee received the two \$100,000 contributions, and that the federal government had
17 awarded Suffolk more than \$168 million worth of contracts since fiscal year 2008.⁶ According

² *Id.* at 2.

³ Suffolk Resp. at 1. (Sept. 1, 2016).

⁴ Priorities USA Action 2015 Year-End Report at 11-12 (Jan. 31, 2016), available at <http://docquery.fec.gov/pdf/767/201601319005016767/201601319005016767.pdf>.

⁵ *Id.*

⁶ Compl. at 4. See Harper Neideg and Jonathan Swan, *Exclusive: Pro-Hillary Group Takes \$200K in Banned Donations*, THE HILL (June 29, 2016).

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1 to the Complaint, Suffolk had been awarded \$1,278,500 in federal contracts in Fiscal Years 2015
2 and 2016 (a period including October 1, 2014, to September 30, 2016) for projects involving the
3 Department of Defense.⁷

4 Suffolk responds that the contract work that it performed for the U.S. Army Corps of
5 Engineers ("USACE") was its only work that might be relevant to this matter.⁸ According to
6 Suffolk, its USACE contract involved multiple construction projects at a Motor Pool facility in
7 West Point, New York. Suffolk states that this contract, which began in March 2009, provided
8 that Suffolk would assist the USACE in relocating a Motor Pool.⁹ In 2014, two years after the
9 original work on the Motor Pool concluded, Suffolk states that the USACE modified the contract
10 in three phases.

11 The third phase of the modified contract covers the period during which Suffolk made the
12 two \$100,000 contributions to the Committee.¹⁰ On July 7, 2015, Suffolk "received" MOD 28,
13 which called for the installation of a new green filter at the Motor Pool, among other things.¹¹
14 On September 18, 2015, USACE issued Amendment P00002 to MOD 28, which involved
15 furnishing and installing an effluent line at the Motor Pool. Suffolk states that its "work on these
16 projects spanned from December 2015 to August 2016."¹²

⁷ *Id.* at 3.

⁸ Suffolk Resp. at 3.

⁹ *Id.*

¹⁰ *Id.* The first phase, Contract Modification ("MOD") 26, called for the design of a waste water treatment plant and was completed on December 14, 2014. The second phase, MOD 27, called for work on the boiler and propane supply system at the Motor Pool, which ended on January 22, 2015.

¹¹ *Id.* at 4.

¹² *Id.*

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1 The Committee denies that it knowingly solicited contributions from a federal
2 contractor.¹³ The Committee asserts that it began an investigation to determine the legality of
3 Suffolk's contributions when it learned that Suffolk may have been a federal contractor at the
4 time it made the contributions.¹⁴ Initially, Suffolk informed the Committee that it was not a
5 federal contractor when it made the two contributions.¹⁵ But on June 29, 2016, Suffolk's legal
6 counsel informed the Committee that "there was a possibility that Suffolk may have been a
7 federal contractor during the period in which it made the [c]ontributions."¹⁶ The Committee
8 asserts that it refunded \$200,000 to Suffolk the next day.¹⁷ Its 2016 July Quarterly Report
9 disclosed these refunds.¹⁸

10 **III. LEGAL ANALYSIS**

11 **A. Federal Contractor Contributions**

12 Under the Act, a federal contractor may not make contributions to political committees.¹⁹
13 Specifically, the Act prohibits "any person . . . [w]ho enters into any contract with the United
14 States . . . for the rendition of personal services or furnishing any material, supplies, or equipment
15 to the United States or any department or agency thereof" from making a contribution "if
16 payment for the performance of such contract . . . is to be made in whole or in part from funds

¹³ Committee Resp. at 1 (Sept. 1, 2016).

¹⁴ *Id.* at 2.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Priorities USA Action Amended 2016 July Monthly Report at 143 (Oct. 20, 2016), *available at* <http://docquery.fec.gov/v/pdf/402/201610209034276402/201610209034276402.pdf>.

¹⁹ 52 U.S.C. § 30119(a); 11 C.F.R. § 115.2.

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1 appropriated by the Congress."²⁰ These prohibitions begin to run at the beginning of negotiations
2 or when proposal requests are sent out, whichever occurs first, and end upon the completion of
3 performance of the contract or the termination of negotiations, whichever occurs last.²¹ And
4 these prohibitions apply to a federal contractor who makes contributions to any political party,
5 political committee, federal candidate, or "any person for any political purpose or use."²²

6 The available record indicates that Suffolk was a federal contractor when it made the
7 contributions. Suffolk states that it "received" MOD 28 to perform additional services to
8 USACE on July 7, 2015, thirteen days before Suffolk's first \$100,000 contribution to the
9 Committee on July 20, 2015.²³ Suffolk does not explain the significance of "receiv[ing]" MOD
10 28, but it is reasonable to infer that it was either a contract proposal or a negotiated work order,
11 thus making Suffolk a federal contractor at that point.²⁴ On September 18, 2015, USACE
12 "issued" an amendment to perform additional services in conjunction with MOD 28. According
13 to Suffolk, its "work on these projects spanned from December 2015 to August 2016,"
14 apparently including December 17, 2015, the date of Suffolk's second contribution. Thus, the

²⁰ 52 U.S.C. § 30119(a)(1); *see also* 11 C.F.R. part 115.

²¹ 52 U.S.C. § 30119 (a)(1); 11 C.F.R. § 115.1(b).

²² 52 U.S.C. § 30119(a)(1); 11 C.F.R. § 115.2.

²³ Suffolk describes the July 7, 2015, MOD 28 as "call[ing] for, among other things, the installation of a new green filter at the Motor Pool." Suffolk Resp. at 4. Although Suffolk speaks to possible differences of opinion with USACE as to whether the original contract dating from 2009 remained in effect through Fiscal Year 2016 or the MOD work was entirely new contracts, the MOD 28 information provided by Suffolk supports its status as a federal contractor at the time of both contributions. *Id.*

²⁴ *See* 52 U.S.C. § 30119(a)(1); 11 C.F.R. § 115.1(b).

1 available information supports a reasonable inference that Suffolk made prohibited federal
2 contractor contributions to the Committee.

3 Suffolk's argument that its federal contract work represented a "small fraction" of its
4 business does not negate the company's status as a federal contractor. Suffolk further asserts that
5 "any inadvertent violation that may have occurred would have been *de minimis* and immediately
6 remedied by Suffolk before any harm could have possibly resulted." While Suffolk may consider
7 its federal contract work a "*de minimis*" portion of its overall work, its \$200,000 in contributions
8 to the Committee are not *de minimis*.²⁵ And Suffolk's July 2015 and December 2015
9 contributions were not refunded for nearly one year, and more than six months, respectively,
10 during which time the Committee spent millions of dollars.²⁶ Accordingly, we recommend that
11 the Commission find reason to believe that Suffolk violated 52 U.S.C. § 30119(a)(1).

12 B. Solicitation of Federal Contractor Contributions

13 The Act also prohibits any person from knowingly soliciting any federal contractor
14 contribution.²⁷ The Complaint alleges that the Committee may have violated this prohibition,
15 citing the fact that Suffolk's two \$100,000 contributions were among the largest contributions the

²⁵ In support of a dismissal, Suffolk cites MUR 5424 (Foxy), in which the Commission took no further action and closed the file with an admonishment, but that matter involved only \$286.71 in impermissible soft money contributions. See MUR 5424 First General Counsel's Report at 4-5. Thus, Foxy is factually distinguishable.

²⁶ See Priorities USA Action 2015 Year-End Report at 4 (disclosing total year-end disbursements of \$5,657,289) (Jan. 31, 2016) available at <http://docquery.fec.gov/pdf/767/201601319005016767/201601319005016767.pdf>; and Priorities USA Action Amended 2016 July Quarterly Report at 4 (disclosing total year-to-date disbursements of \$54,650,193.92) (Oct. 10, 2016) available at <http://docquery.fec.gov/pdf/402/201610209034276402/201610209034276402.pdf>. While Suffolk states that its contributions were refunded before the Complaint in this matter was filed, the June 30, 2016, refund occurred after the Center for Public Integrity's April 7, 2016, report on Suffolk's contributions to the Committee and a June 29, 2016, article on the subject. See Compl. at 4-5; Harper Neidig and Jonathan Swan, *Exclusive: Pro-Hillary Group Takes \$200K in Banned Donations*, THE HILL (June 29, 2016).

²⁷ See 52 U.S.C. § 30119(a)(2); see also 11 C.F.R. § 115.2(c).

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V. **RECOMMENDATIONS**

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1. Find reason to believe that Suffolk Construction Company, Inc. violated
52 U.S.C. § 30119(a)(1);

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2. Take no action at this time with respect to Priorities USA Action and Greg Speed
in his official capacity as treasurer;

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3. Authorize pre-probable cause conciliation with Suffolk Construction Company,
Inc.;

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4. Approve the attached conciliation agreement;

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5. Approve the attached Factual and Legal Analysis;

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6. Approve the appropriate letter.

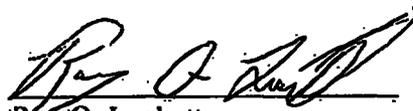
Lisa J. Stevenson
Acting General Counsel

Kathleen M. Guith
Associate General Counsel
for Enforcement

Date: 2.14.17


Stephen Gura
Deputy Associate General Counsel
for Enforcement


Mark Allen
Assistant General Counsel


Roy Q. Lockett
Attorney

Attachments:

1. Factual and Legal Analysis of Suffolk Company, Inc.
- 2.

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1 **FEDERAL ELECTION COMMISSION**

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3 **FACTUAL AND LEGAL ANALYSIS**

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6 **RESPONDENT:** Suffolk Construction Company, Inc.

MUR: 7099

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8 **I. INTRODUCTION**

9 This matter was generated by a by Paul S. Ryan, the Campaign Legal Center through J.
10 Gerald Herbert, and Democracy 21 through Fred Wertheimer. For the reasons described below,
11 the Commission finds reason to believe that the Suffolk Construction Company, Inc. ("Suffolk")
12 violated 52 U.S.C. § 30119(a)(1) by making contributions as a federal contractor.

13 **II. FACTUAL BACKGROUND**

14 Suffolk is a Massachusetts corporation involved in various construction projects. While
15 Suffolk maintains that it primarily served as a general contractor and construction manager for
16 privately funded projects, it acknowledges that a "small fraction" of its work over the past five
17 years included federal contracts.¹ Suffolk contributed \$100,000 to the Committee on July 20,
18 2015, and another \$100,000 to the Committee on December 17, 2015.² The Committee
19 disclosed receipt of these contributions on its 2015 Year-End Report.³

20 The Complaint notes that on April 7, 2016, the Center for Public Integrity reported that
21 the Committee received the two \$100,000 contributions, and that the federal government had

¹ Suffolk Resp. at 1. (Sept. 1, 2016).

² Priorities USA Action 2015 Year-End Report at 11-12 (Jan. 31, 2016), available at <http://docquery.fec.gov/pdf/767/201601319005016767/201601319005016767.pdf>.

³ *Id.*

1 awarded Suffolk more than \$168 million worth of contracts since fiscal year 2008.⁴ According
2 to the Complaint, Suffolk had been awarded \$1,278,500 in federal contracts in Fiscal Years 2015
3 and 2016 (a period including October 1, 2014, to September 30, 2016) for projects involving the
4 Department of Defense.⁵

5 Suffolk responds that the contract work that it performed for the U.S. Army Corps of
6 Engineers (“USACE”) was its only work that might be relevant to this matter.⁶ According to
7 Suffolk, its USACE contract involved multiple construction projects at a Motor Pool facility in
8 West Point, New York. Suffolk states that this contract, which began in March 2009, provided
9 that Suffolk would assist the USACE in relocating a Motor Pool.⁷ In 2014, two years after the
10 original work on the Motor Pool concluded, Suffolk states that the USACE modified the contract
11 in three phases.

12 The third phase of the modified contract covers the period during which Suffolk made the
13 two \$100,000 contributions to the Committee.⁸ On July 7, 2015, Suffolk “received” MOD 28,
14 which called for the installation of a new green filter at the Motor Pool, among other things.⁹

⁴ Compl. at 4. See Harper Neideg and Jonathan Swan, *Exclusive: Pro-Hillary Group Takes \$200K in Banned Donations*, THE HILL (June 29, 2016).

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⁹ *Id.* at 4.

1 On September 18, 2015, USACE issued Amendment P00002 to MOD 28, which involved
2 furnishing and installing an effluent line at the Motor Pool. Suffolk states that its “work on these
3 projects spanned from December 2015 to August 2016.”¹⁰

4 On June 30, 2016, the Committee refunded Suffolk’s \$200,000 total contributions.

5 III. LEGAL ANALYSIS

6 Under the Federal Election Campaign Act of 1971, as amended (the “Act”), a federal
7 contractor may not make contributions to political committees.¹¹ Specifically, the Act prohibits
8 “any person . . . [w]ho enters into any contract with the United States . . . for the rendition of
9 personal services or furnishing any material, supplies, or equipment to the United States or any
10 department or agency thereof” from making a contribution “if payment for the performance of
11 such contract . . . is to be made in whole or in part from funds appropriated by the Congress.”¹²

12 These prohibitions begin to run at the beginning of negotiations or when proposal requests are
13 sent out, whichever occurs first, and end upon the completion of performance of the contract or
14 the termination of negotiations, whichever occurs last.¹³ And these prohibitions apply to a
15 federal contractor who makes contributions to any political party, political committee, federal
16 candidate, or “any person for any political purpose or use.”¹⁴

17 The available record indicates that Suffolk was a federal contractor when it made the
18 contributions. Suffolk states that it “received” MOD 28 to perform additional services to

¹⁰ *Id.*

¹¹ 52 U.S.C. § 30119(a); 11 C.F.R. § 115.2.

¹² 52 U.S.C. § 30119(a)(1); *see also* 11 C.F.R. part 115.

¹³ 52 U.S.C. § 30119 (a)(1); 11 C.F.R. § 115.1(b).

¹⁴ 52 U.S.C. § 30119(a)(1); 11 C.F.R. § 115.2.

1 USACE on July 7, 2015, thirteen days before Suffolk's first \$100,000 contribution to the
2 Committee on July 20, 2015.¹⁵ Suffolk does not explain the significance of "receiv[ing]" MOD
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7 apparently including December 17, 2015, the date of Suffolk's second contribution. Thus, the
8 available information supports a reasonable inference that Suffolk made prohibited federal
9 contractor contributions to the Committee.

10 Suffolk's argument that its federal contract work represented a "small fraction" of its
11 business does not negate the company's status as a federal contractor. Suffolk further asserts that
12 "any inadvertent violation that may have occurred would have been *de minimis* and immediately
13 remedied by Suffolk before any harm could have possibly resulted." While Suffolk may
14 consider its federal contract work a "*de minimis*" portion of its overall work, its \$200,000 in
15 contributions to the Committee are not *de minimis*.¹⁷ And Suffolk's July 2015 and December
16 2015 contributions were not refunded for nearly one year, and more than six months,

¹⁵ Suffolk describes the July 7, 2015, MOD 28 as "call[ing] for, among other things, the installation of a new green filter at the Motor Pool." Suffolk Resp. at 4. Although Suffolk speaks to possible differences of opinion with USACE as to whether the original contract dating from 2009 remained in effect through Fiscal Year 2016 or the MOD work was entirely new contracts, the MOD 28 information provided by Suffolk supports its status as a federal contractor at the time of both contributions. *Id.*

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